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# In the United States Circuit Court of Appeals for the Ninth District

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AMERICAN SURETY COMPANY,

a corporation of New York,

*Plaintiff in Error,*

vs.

No. 2951.

PETER SANDBERG and MATHIL-

DA SANDBERG, his wife,

*Defendants in Error.*

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UPON WRIT OF ERROR TO THE UNITED STATES DIS-  
TRICT COURT OF THE WESTERN DISTRICT OF  
WASHINGTON, SOUTHERN DIVISION.

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## Brief of Defendants in Error

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### STATEMENT OF THE CASE.

The statement made by plaintiff in error does not extend beyond a partial statement of the issues involved as made by the pleadings. We will therefore take it upon ourselves to make a full statement of the facts of the case.

This action was commenced by plaintiff in error against defendants in error to recover judgment

against defendants in error on an agreement of indemnity executed by defendant Peter Sandberg to plaintiff, under date June 2nd, 1910, to indemnify it against liability or loss by reason of its executing a certain bond in the sum of twenty-five thousand dollars, in behalf of Wells Construction Company, a corporation, obligor, to Powell River Paper Company, of Vancouver, British Columbia, obligee, to secure the performance of a contract theretofore entered into between the Wells Construction Company and the Powell River Paper Company.

See Plaintiff's Exhibit No. 2, Trans., p. 171.

The Wells Construction Company defaulted in the performance of its contract with the Powell River Paper Company and the Powell River Paper Company commenced an action in the Supreme Court of British Columbia, recovering a judgment therein against the Wells Construction Company and its surety, American Surety Company of New York, plaintiff in error here, in the sum of twenty-five thousand dollars.

See Plaintiff's Exhibit No. 5, Trans., p. 172.

Defendant Mathilda Sandberg appearing separately answered plaintiff's complaint admitting that her co-defendant, Peter Sandberg, signed and subscribed the indemnity agreement, Exhibit 2, and alleged that said Peter Sandberg executed the same for the sole use, benefit and accommodation of the

Wells Construction Company, a corporation, and that he did not sign or execute the same for the use, benefit or profit of himself, or of her, or either of them, nor for the use, benefit or profit of the community consisting of defendants, or for any purpose in which defendants, or either of them, or the community consisting of defendants, was interested in any manner whatsoever, and that so far as she and the community were concerned the same was without consideration.

See Separate Answer of Mathilda Sandberg.  
Trans., pp. 63-66.

She further pleaded affirmatively that she and her co-defendant, Peter Sandberg, married on November 30th, 1894, and ever since said time were husband and wife, and then set forth, describing in detail, certain real property, all of which she alleged was acquired after their marriage by their joint efforts, and not by gift, bequest or inheritance, and that the same was community property, and prayed that whatever judgment, if any, should be recovered against her co-defendant, Peter Sandberg, should be adjudged and decreed to be his separate debt, and not her debt or obligation, nor a debt or obligation of the community consisting of herself and husband, Peter Sandberg, and further prayed that said judgment be adjudged not to be a lien on the community real property of defendants.

Trans., pp. 66-69.

The answer of defendant Mathilda Sandberg being in effect that the indemnity agreement sued upon in this action was executed by her co-defendant, Peter Sandberg, simply as an accommodation maker, and that therefore under the laws of the State of Washington there was no liability thereon against the Sandberg community.

A jury trial was waived by stipulation, and the cause was tried to the Court, resulting in a judgment against defendant Peter Sandberg in the full amount sued for, the Court holding, however, that it was his separate debt, and that the defendant Mathilda Sandberg and the community real property of defendants in error was not affected by the lien of said judgment, and dismissing the action as to Mathilda Sandberg.

See Judgment, Trans., p. 163.

From that portion of the judgment relieving defendant Mathilda Sandberg, and the community of Sandberg and wife from liability, plaintiff in error prosecutes this appeal.

The Court made elaborate Findings of Fact covering specifically and in detail the controlling features of the case, which will be hereinafter referred to.

We take it that the following facts are conceded:

That defendants Peter Sandberg and Mathilda

Sandberg married on November 30th, 1894, and are husband and wife.

That at the time of their marriage defendant Peter Sandberg had no property, except an equity in a small house worth about six hundred dollars. That thereafter he sold the house, and the money was expended by him without his keeping any separate account of the same.

That all of the real property described in the separate answer of defendant Mathilda Sandberg was acquired by purchase during the existence of the marriage relation between defendants in error by their joint efforts, and not by gift, bequest, or inheritance.

The following additional facts are established beyond controversy, viz:

That neither the defendant Peter Sandberg nor Mathilda Sandberg, his wife, were ever at any time stockholders in the Wells Construction Company.

Simon Mettler, Trans., p. 212.

Mathilda Sandberg, Trans., p. 183.

Peter Sandberg, Trans., p. 233.

Joseph Wells, Trans., p. 197.

Neither did either of said defendants have any interest, directly or indirectly, in the business of the Wells Construction Company.

Mathilda Sandberg, Trans., p. 183.

Peter Sandberg, Trans., p. 233.



Neither did said defendants, or either of them, participate in any way in the earnings or profits of the Wells Construction Company, or in any of its undertakings.

Peter Sandberg, Trans., p. 233.

In this connection the Court made the following Finding:

“That neither of the defendants, Peter Sandberg or Mathilda Sandberg, his wife, were ever stockholders of the Wells Construction Company, and neither of said defendants had any financial interest in the Wells Construction Company.”

Finding No. XII, Trans., p. 137.

That neither of said defendants ever received anything, any property, advantage or consideration from the Wells Construction Company, or from the business in which it was engaged.

Simon Mettler, Trans., p. 211.

Peter Sandberg, Trans., pp. 234-238.

That defendant Peter Sandberg executed the indemnity agreement (Plaintiff's Exhibit 2) at the request of Simon Mettler and Joseph Wells, stockholders of the Wells Construction Company, without ever having received, and without the expectation, promise, understanding or opportunity of receiving any advantage, thing of value, opportunity to profit out of the transaction, either directly or indirectly.

Simon Mettler, Trans., pp. 210-211-214.

Joseph Wells, Trans., p. 199.



That Sandberg's act in signing the indemnity agreement was purely and solely an act of accommodation and friendship, for the sole use, profit and benefit of his friend Simon Mettler and the Wells Construction Company, and not for the use, profit or advantage, or in the prosecution of the community business of defendants Sandberg and wife, and not for the use, benefit or profit of either of them.

Simon Mettler, Trans., pp. 211-13-14-15.

In this connection the Court found:

"That defendant Peter Sandberg signed the application or indemnity agreement (Plaintiff's Exhibit 2) at the request of, and for the accommodation and use of Simon Mettler, who was a large stockholder and officer of the Wells Construction Company, and an old friend of defendant Peter Sandberg, and that there was no agreement or understanding whatsoever that said defendants, or either of them, should receive anything for said Peter Sandberg signing said application."

Finding No. XII, Trans., p. 137.

The only dealings which the defendants in error had with the Wells Construction Company were a contract entered into by them with the Wells Construction Company for the building of a wing to the Kentucky Building, at the agreed price of thirty-three thousand dollars, which was in writing, and an oral agreement thereafter for the construc-

tion of an additional story for thirty-five hundred dollars.

Joseph Wells, Trans., p. 200.

Defendant's Exhibit "A," Trans., pp. 200-201.

Simon Mettler, Trans., p. 214.

The building was practically completed and paid for prior to June 20th, 1910, thirty-five thousand five hundred and fifty and 80/100 dollars in cash payments having been made between January 22nd, 1910, and June 18th, 1910, in addition to certain labor claims amounting to about fourteen hundred dollars.

Joseph Wells, Trans., p. 201.

Defendants' Exhibit "B," being eleven checks as follows:

Date.	By Whom Drawn.	Payee.	Amount.
Jan. 22, 1910.	Peter Sandberg.	Wells Construction Co.	\$5,000.00
Feb. 12, 1910.	Peter Sandberg.	Joseph Wells -----	1,550.00
Feb. 12, 1910.	Peter Sandberg.	Joseph Wells -----	5,000.00
Marked, To apply on construction 1128 Pac. Ave. Bldg.,			
Mar. 3, 1910.	Peter Sandberg.	Wells Construction Co.	4,000.00
Mar. 17, 1910.	Peter Sandberg.	Wells Construction Co.	4,000.00
Apr. 9, 1910.	Peter Sandberg.	Wells Construction Co.	5,000.00
Apr. 23, 1910.	Peter Sandberg.	Joseph Wells -----	2,000.00
Apr. 25, 1910.	Peter Sandberg.	Wells Construction Co.	1,000.00
May 19, 1910.	Peter Sandberg.	Wells Construction Co.	5,000.00
June 4, 1910.	Peter Sandberg.	Wells Construction Co.	1,500.00
June 18, 1910.	Peter Sandberg.	Wells Construction Co.	1,500.00

Besides seven checks amounting to fourteen hundred thirty-two and 25/100 dollars, paid on the order of Wells Construction Company.

Joseph Wells, Trans., p. 201.

At that time the building was estimated to be ninety-five per cent. completed.

Joseph Wells., Trans., p. 206.

In this connection the Court made the following Finding:

“That, at the time defendant Peter Sandberg signed said application, the Wells Construction Company was constructing the building mentioned in the preceding finding for defendants, the contract price for which building, together with extras, was thirty-six thousand, five hundred dollars, on which the defendants had, prior to June 20, 1910, paid the sum of thirty-six thousand, three hundred eighty-three and 05/100 dollars (\$36,383.05). That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatever in the relationship of defendants and Wells Construction Company, in the matter of the construction of said building and the signing of said indemnity agreement (Plaintiff's Exhibit No. 2).”

Finding No. XII, Trans., pp. 137-138.

That at said time, which was the time that Sandberg executed the indemnity agreement (Plaintiff's Exhibit No. 2), the Wells Construction Company was in good financial standing, and was amply able financially to carry out all of its contracts, and was paying its debts in the usual course of its business, and was able to complete its contract with Sandberg for the construction of the

wing to the Kentucky Building on its own account, without any aid or assistance from Sandberg, or anybody else.

Joseph Wells, Trans., p. 206.

Simon Mettler, Trans., p. 211.

In this connection the Court found:

“That at said time the Wells Construction Company was in good and substantial financial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course.”

Finding No. XII, Trans., p. 138.

That subsequent to June 20th, 1910, the Wells Construction Company entered into other large contracts, and secured large loans of money from the Molsons Bank of Vancouver, B. C., of more than fifty-five thousand dollars, and the Bank of Vancouver, where it borrowed more than thirty-five thousand dollars. That nothing was ever said about the relations or business of the Wells Construction Company in connection with its contract with Peter Sandberg for the construction of the wing to the Kentucky Building in connection with Sandberg's signing of the indemnity agreement (Exhibit No. 2), and that the transaction with relation to the construction of the wing to the Kentucky Building had no relation or connection with Sandberg's act in signing the indemnity agreement (Plaintiff's Exhibit No. 2).

Joseph Wells, Trans., p. 200.

Simon Mettler, Trans., pp. 209-210.

That the only promise or agreement that Simon Mettler or Joseph Wells, or the Wells Construction Company, or any, or either of them, or anybody else made with Peter Sandberg in connection with his signing of the indemnity agreement (Plaintiff's Exhibit No. 2), was that he would in turn be indemnified against loss in accordance with the terms of the written agreement.

Plaintiff's Exhibit No. 10, Trans., pp. 226-231.

Simon Mettler, Trans., pp. 219-220-231.

That defendant Peter Sandberg endorsed the notes of the Wells Construction Company at the Bank of Vancouver and the Molsons Bank, and to indemnify him because of his endorsement certain real property was conveyed to the Kentucky Liquor Company as a trustee, for the sole use, benefit and protection of the Bank of Vancouver.

Simon Mettler, Trans., pp. 214-215.

Peter Sandberg, Trans., pp. 235-236.

C. T. Peterson, Trans., p. 244.

Defendants' Exhibit "E", Trans., p. 245.

That Simon Mettler agreed to convey to Sandberg, to indemnify him against loss for endorsing the note of the Wells Construction Company at the Molsons Bank, certain real property.

Peter Sandberg, Trans., pp. 240-241.

That the loan made by the Molsons Bank was

made on the 19th of October, 1910. Thereafter Sandberg, at the instance and request of the Molsons Bank, brought suit against Simon Mettler to require him to convey said property as indemnity for the use, benefit and protection of the Molsons Bank.

Peterson, Trans., p. 241.

Peter Sandberg, Trans., p. 240.

That Mathilda Sandberg never at any time acquiesced in, approved or ratified the acts of her husband Peter Sandberg in executing the indemnity agreement (Exhibit No. 2), and that she did not know that he had signed said indemnity agreement until after the commencement of this action.

Mathilda Sandberg, Trans., pp. 182-187-194.

We have grouped all of these facts, because the Court made one Finding referring to all of them, to-wit:

“That defendant Peter Sandberg, without the knowledge, consent or acquiescence of Mathilda Sandberg, from time to time signed certain notes and guarantees to banks in British Columbia, referred to in the testimony herein, in addition to the indemnity agreement to plaintiff sued on herein, which said notes and guarantees so signed by defendant Peter Sandberg were for the use and accommodation of the Wells Construction Company, Simon Mettler, George Vergowe and Joseph Wells. That in signing and executing said notes and guarantees and in signing and entering into the several agreements referred to in the tes-



timony herein, excepting, however, the building contract of the Kentucky Building, and in all of his acts and doings in connection with said notes, guarantees and other agreements, excepting said contract for the Kentucky Building, and in the conveying of the property in trust by Peter Sandberg to the Kentucky Liquor Company, and to Elmer M. Hayden, and the bringing of the foreclosure suit by said Elmer M. Hayden, and the selling of said property, and in the bringing of said action by Peter Sandberg in the Superior Court of Pierce County, against Carl Mettler and wife, and Simon Mettler and wife, referred to in the testimony, and in the transaction concerning the taking of the capital stock of the Wells Construction Company by Peer and Peterson, as trustees, and all acts and things that defendant Peter Sandberg may have done in that respect, and with respect to the Wells Construction Company, Simon Mettler, Joseph Wells, George Vergowe, Elmer M. Hayden, as trustee, the Kentucky Liquor Co., the Molsons Bank and the Bank of Vancouver, and with plaintiff herein, as referred to in the testimony, with the exception of said building contract for the Kentucky Building, were all matters and things that did not affect or concern the community of defendants, or the defendant Mathilda Sandberg, and were for the sole use, benefit and accommodation of third persons, and were not for the use, benefit, profit or advantage of defendant Peter Sandberg, or of the community consisting of himself and Mathilda Sandberg, his wife, or either of them, nor in the carrying on of the business of himself or wife, or of their community, or of either of them. That the contract regarding the construction of the Kentucky Liquor Company building entered into by the defendant Peter Sandberg with the Wells Construction



Company was made and practically carried out and completed prior to the time that defendant Peter Sandberg executed the indemnity agreement sued on herein (Plaintiff's Exhibit No. 2), and that said building contract, and the relationship of the parties thereto, was entirely disconnected with any of the other dealings of defendant Peter Sandberg with the Wells Construction Company and the persons and corporations above referred to, and was entirely independent thereof, and was not spoken of or considered by any of the parties in connection with any of the other transactions above referred to, and was entirely independent thereof, and anything done by either of, or any of the parties regarding the Kentucky Building contract was not a consideration, and was not regarded as a consideration of any of the agreements, endorsements, acts or things done by defendant Peter Sandberg above referred to."

Finding No. XXIII, Trans., pp. 152-153-154.

In the latter part of November, 1910, it became apparent that the Wells Construction Company was about to fail, and because of being an endorser on a large amount of its notes, defendant Peter Sandberg was requested to meet with the officers of the company regarding its financial affairs. After a full discussion of the matter it was agreed that the capital stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of the stockholders of the Wells Construction Company, and not otherwise, and held by them until such time as defendant Peter Sandberg could make an

investigation into the affairs of the Wells Construction Company, and decide whether or not he would undertake to finance the company to enable it to carry out its contracts, so as to save himself, as far as possible, from loss. This was done, and an investigation had. Mr. Sandberg declined to finance the company, and so notified the stockholders, whereupon the stockholders directed Peer and Peterson, as trustees, to turn all of the stock of said corporation over to one Joseph Wells, which was done.

Peter Sandberg, Trans., p. 104.

The Court referred to this matter in its Finding No. XXV, as follows:

“That in the latter part of November, 1910, defendant Peter Sandberg was requested to meet with the officers of the Wells Construction Company in its office at Tacoma, Washington, regarding the affairs of the Wells Construction Company at Vancouver, B. C. At the meeting it was stated by the officers of the Wells Construction Company that it had valuable contracts in process of completion in and near Vancouver, B. C., but that they as individuals and the Wells Construction Company had exhausted their credit, and if the defendant Peter Sandberg would finance the Company and enable it to complete the contracts he would be thereby able to save himself any loss as surety on the bonds given to secure the performance of said contracts, and certain notes endorsed by him for the company. The officers and stockholders of the Wells Construction Company stated that they had abandoned the business of the corporation and carry out

the contracts for the purpose of protecting, as far as possible, his endorsement on the bonds and notes of the Company. That it was agreed between the officers and stockholders of the corporation, and defendant Peter Sandberg that the stock of the corporation should be placed in the hands of Newton H. Peer and Charles T. Peterson, as trustees, for the use and benefit of said stockholders, and not otherwise. That said stock was to be held by said trustees until such time as defendant Peter Sandberg could make an investigation into the affairs of the Wells Construction Company, and decide whether or not he wanted to undertake to finance the company, and if he did not desire to finance the corporation to enable it to carry out the contracts, then the stock of said corporation should be turned over to whomsoever said stockholders should direct. That in accordance therewith defendant Peter Sandberg immediately caused an investigation and examination of said contracts to be made, and decided that he did not want to undertake to finance the company in carrying out the same, and so notified the stockholders, whereupon said stockholders directed said Newton H. Peer and Charles T. Peterson as trustees to transfer all of said stock of said corporation to one Joseph Wells, and said Newton H. Peer and Charles T. Peterson, as said trustees, carried out said directions and instructions, and transferred all of said stock to said Joseph Wells."

Finding No. XXV, Trans., pp. 154-155-156.

And referring to this transaction in its opinion stated:

"Later, after that company got into financial difficulties, its stock was delivered to the

attorneys for Peter Sandberg, pending an investigation by him as to whether he would undertake the completion of the company's work in British Columbia in order to save himself. He also caused certain property to be deeded over to a company of which he owned the stock, the object of such transaction being to secure certain notes upon which he had become security. The result would be an indemnification of himself proportioned to the value of the property as transferred.

"A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself, so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs."

Trans., p. 86.

## ARGUMENT.

The community property laws of the State of Washington place upon the wife a status with relation to the property rights of husband and wife so different from the other States having the communal system, that we deem it necessary to set forth the property statutes in full.

The Code, Remington's 1915 Codes and Statutes, provides:

## "HUSBAND AND WIFE.

"Section 5915. SEPARATE PROPERTY OF HUSBAND.—Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried."

"Section 5916. SEPARATE PROPERTY OF WIFE.—The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him."

"Section 5917. COMMUNITY PROPERTY DEFINED—HUSBAND'S CONTROL OF PERSONALTY.—Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

"Section 5918. COMMUNITY REALTY, CONVEYANCE OF, ETC.—The husband has the management and control of the community real



property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon."

"Section 5923. LIBERAL CONSTRUCTION.—The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this chapter. The chapter establishes the law of this State respecting the subject to which it relates, and its provisions and all proceedings under it shall be liberally construed with a view to effect its object."

It will be observed that the power of the husband cannot be extended so as to operate directly or indirectly to alienate or encumber the community real property, and inasmuch as the Supreme Court of the State of Washington has many times interpreted the sections of the statute set forth, and in view of the well established rule that the Federal Courts will follow the decisions of the highest court of the State interpreting the law of the State with respect to property rights, we will not extend our discussion of this question beyond a review of the decisions of our own State.

The case of *Brotten vs. Langert*, 1 Washington 73, seems to be the first well-considered case on the subject, decided by the Supreme Court of this State.

The Court, speaking through the late Justice Dunbar, well said:

“The community, composed of husband and wife, is purely a statutory creation; and to the statute alone must we look for its powers, its liabilities and its exemptions. \* \* \* The statute alone determines who the members of the community shall be, the manner in which it shall acquire property, and defines and limits not only the powers of the members of the community over said property, but protects it from acquisition by others, excepting in the manner specified. It also lays down its own rule of construction in the language of the act itself: ‘The rule of common law that statutes in derogation thereof are to be strictly construed, has no application to this chapter. This chapter establishes the law of this territory respecting the subject to which it relates; and its provisions and all proceedings under it shall be liberally construed with a view to effect its object.’ Then the pertinent and vital question becomes, What was the object sought to be effected? Section 2396 provides, ‘That every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property and to sue and be sued as if he or she were unmarried,’ and Section 2398 abolishes ‘all laws imposing civil disabilities upon a wife which are not imposed upon a husband,’ and succeeding sections define what separate property is, and provide how it may be acquired and in what manner disposed of. So far the evident object



of the law is to place husband and wife on an equal footing in relation to property matters. Section 2409 is as follows: 'Property not acquired or owned, as prescribed in Sections 2400 and 2408, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.' This section discriminates in favor of one spouse only so far as is actually necessary for the transaction of ordinary business. Section 2407 provides that the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately. Section 2410 reads as follows: 'The husband has the management and control of the community real property; but he shall not sell, convey or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife; provided, however, that all such community real estate shall be subject to the liens of mechanics and others, for labor and material furnished in erecting structures and improvements thereon, as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon.' Construing all the provisions of the chapter together, we cannot escape the conclusion that the object of the law was to protect (so far as is consistent with the transaction of ordinary business,

as we before observed,) one spouse from the misdeeds, improvidence or mismanagement of the other concerning property which is the product of their joint labors. It is in the nature of an exemption, and, as has been well said, 'exemption laws are upheld upon principles of justice and humanity.' The statute provides the ways in which this property can be alienated: First, the voluntary alienation by the husband and wife joining in the deed; second, by making it responsive to certain demands, constituted liens by the statute; and there is no other way contemplated. In fact, the very object of the law is to prevent its alienation in any other way. It expressly provides that the husband shall not sell, convey or encumber it, and he will not be allowed to do, by indirection or fraud, that which he is directly prohibited from doing. The practical result to the non-contracting spouse would be the same whether the law allowed the other spouse to directly convey the property, or allowed the title to pass through the medium of a sale on an execution flowing from a judgment to which he, or she, was not a party. It is the results the law regards; the modes are not important."

These principles have been adhered to by the Supreme Court of the State in all of its decisions involving community property liability since that time.

In the case of *Spinning v. Allen*, reported in 10 Washington 570, which was overruled on another proposition, the Court said:

"The contract being one of suretyship, of course the judgment stands upon the same

footing, and the further question is presented as to whether community real estate can be held on a judgment obtained upon a contract of suretyship entered into by the husband. We have held that debts contracted by the husband in carrying on a business which is prosecuted in the interests of the community are community debts, on the ground that as the community receives the benefits of such a business it should be held liable for the losses. But we have never held the community real estate liable for a suretyship debt. The Code (Gen. Stat., Section 1413,) expressly provides that neither spouse shall be liable for the separate debts of the other. When the community is not liable for a debt contracted by the husband concerning his separate property, for which he received a consideration, how can it be said that the community should be held for a debt contracted where there was no consideration received or implied, moving to either the husband separately or to the community, as in the case of a suretyship, where the consideration moves, and is intended to move, entirely to a third party? Certainly there can be no presumption in any way that the community is or could be benefited by the husband's becoming a surety. There would be much more reason in holding the community where the husband contracts a separate debt for which he receives a consideration, for indirectly the wife or the community might receive some benefit therefrom, but the statute aforesaid shuts off any such liability. It would be going a step beyond this to hold the community responsible on a suretyship debt contracted by the husband."

This case was afterward reversed on a finding that the debt sued upon was one for the benefit of

the community, the husband having endorsed the note of a corporation in which he was a stockholder.

In *Gunde v. Parke*, 15 Washington 393, the Court held that a promissory note made to evidence a debt, which was not for the benefit of the community, should not be collected out of the community real estate, although it was made by the husband and had passed into the hands of a *bona fide* purchaser for value before maturity.

The same rule has been consistently enforced in the following cases:

*Horton v. Donohoe Kelly Bank Co.*, 15 Wash. 399.

*Shuey v. Holmes*, 22 Wash. 194.

*McDonough v. Craig*, 10 Wash. 239.

*Shuey v. Holmes*, 20 Wash. 13.

*Dane v. Daniel*, 23 Wash. 379.

*Olson v. Springer*, 60 Wash. 77.

*Bird v. Steel*, 74 Wash. 68.

*Way v. Lyric Theatre Co.*, 79 Wash. 275.

*Case Threshing Machine Company v. Wiley*, 89 Wash. 301.

Where a husband signed a note as surety only and received no consideration, it was held not a community debt, and judgment against the community was denied.

*Wilson v. Stone*, 90 Wash. 365.

To cite further cases would be a work of supererogation.

It must be perfectly manifest to this Court that defendant Peter Sandberg executed the indemnity agreement ("Plaintiff's Exhibit No. 2") purely as a matter of accommodation for his old, long-time friend, Simon Mettler, without any hope, promise or opportunity of reward or compensation for himself, or his co-defendant, Mathilda Sandberg, or their community, as the trial court found. In order that the community estate of these parties should be bound to respond for the payment of this obligation it was essential that the trial court find that the transaction was one for the benefit of the community; that is, one in the prosecution of the business of Peter Sandberg and his wife; one out of which the community of Sandberg and wife would get something in the way of profit or compensation should the venture prove a success.

We readily concede that in order that this obligation be one of the community of Sandberg and wife, that it was not essential that the community did actually receive a benefit out of the transaction, but it was essential that the transaction was one in the prosecution of community business, one out of which the community would have received a benefit or profit, should the venture prove a success.

Viewing this case entirely from plaintiff's own



standpoint, it must fail in its efforts to recover a judgment against the community.

DEFENDANTS' EXHIBITS 9 AND 10.

Counsel contends, brief, pp. 21 and 26, that on June 20th, 1910, and on November 26th, 1910, the latter date being long after the making of the indemnity bond sued on here, the Wells Construction Company and Mettler and Vergowe, as individuals, entered into a writing with defendant Peter Sandberg to indemnify and save him harmless from any liability because of his signing the indemnity agreement, Plaintiff's Exhibit No. 2, and that in November, 1910, the agreement, Exhibit No. 9, was entered into, whereby certain property was conveyed to the Kentucky Liquor Company (a Sandberg corporation), as trustee, to be held by it, for the purpose of indemnifying defendant Sandberg from liability or loss by reason of his signing certain notes as surety for the Wells Construction Company, and by reason also of his having signed Plaintiff's Exhibit No. 2. Is it possible by any stretch of the imagination to conceive how the defendants, or the community of Sandberg and wife, could possibly profit in the least out of such a transaction? If the undertaking by the Wells Construction Company had proven a success and the contracts had been carried to completion, and it had made a handsome profit out of the undertaking, the only result to defendant Sandberg would have been that he would have been released from

liability on the bond, or rather on the indemnity agreement, Plaintiff's Exhibit No. 2, given plaintiff, and the Wells Construction Company and Mettler and Vergowe would have been released on their indemnity agreements to Sandberg. The venture having proven a failure, the notes not being paid, the property and indemnity conveyed to the Kentucky Liquor Company went to the creditors, the Bank of Vancouver and the Molsons Bank. Sandberg could not take any of it, neither did he do so. He might have paid the debt and then held the property as security for the moneys so advanced by him, but whenever the Wells Construction Company and Vergowe and Mettler tendered or paid to him the amount he would have paid out in that connection it would have been his absolute, positive duty to have caused the property to be reconveyed to them. In either event he could not profit. He had no advantage; he had no opportunity of profit or benefit. The mere fact that he signed a note as a surety for the accommodation of another, and then took some indemnity to protect himself, did not change the legal effect of the transaction from a separate undertaking of his to one in behalf of the community of himself and wife.

Referring to these transactions, Judge Cushman in the course of his opinion said:

“A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself,



so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs."

See Trans., p. 86.

At page 28 of plaintiff's brief (referring to Exhibits 8 and 9) we find the following statement:

"The Court refused to consider these exhibits as matter of law in any wise relative to the case so far as community was concerned; and this action is assigned as error, 13th Assignment, record, p. 261."

As to Exhibit No. 9, the record shows Plaintiff's Exhibit No. 9 offered and received in evidence.

Trans., p. 220.

As to Plaintiff's Exhibit No. 10, the record shows (Exhibit No. 10), was over the objection of defendant Mathilda Sandberg, that it was irrelevant and immaterial, admitted in evidence.

Trans., p. 228.

Beginning on page 30, under the title, "The Law of the Case," plaintiff in error begins a discussion of the decisions of the State of Washington. It would serve no good purpose to follow his discussion in this particular. All of the cases to which he refers recognize in no unmistakable way the unvarying rule laid down in the early case of

*Brotten v. Langert*, 1 Wash. 73, to which we have called particular attention and quoted from at length.

On page 37 of its brief, plaintiff contends that Sandberg deliberately contracted in writing with the plaintiff that he was beneficially interested in the performance of the contracts of the Wells Construction Company, and is now estopped. This is undoubtedly true as to the defendant Peter Sandberg himself, but the estoppel would not operate as against Mrs. Sandberg, or as against the community.

On page 40 of its brief, plaintiff states that defendant Sandberg was largely indebted to the Wells Construction Company in June, 1910, upon the contract for the building of the Kentucky Building. The facts are, as the Court found,

“That, at the time defendant Peter Sandberg signed said application, the Wells Construction Company was constructing the building mentioned in the preceding finding, for defendants, the contract price for which building, together with extras, was thirty-six thousand five hundred dollars, on which the defendants had, prior to June 20, 1910, paid the sum of thirty-six thousand three hundred eighty-three and 05-100 dollars (\$36,383.05.) That at said time said building was practically completed, and that said payments so made by defendants were entirely in cash, paid on checks drawn by defendant Peter Sandberg, and that there was no connection whatsoever in the relationship of defendants and Wells

Construction Company in the matter of the construction of said building and the signing of said indemnity agreement, 'Plaintiff's Exhibit No. 2.' "

Trans., pp. 137-138.

On page 40 of plaintiff's brief we find the following unwarranted statement:

"All of the undisputed and uncontradicted circumstances show that Sandberg's intention and purpose was to take and obtain full indemnity for all liabilities the community assumed through him.

"Particularly the payments for labor and for material that went into the building erected under 'Defendant's Exhibit A.'

See checks to Tacoma Mill Company.

See checks to Grosser.

See checks to Olaf Halstead and others.

Sandberg also testified he had to take the building over and finish it himself."

The building was practically completed and practically paid for at the time plaintiff's bond was executed, and while Sandberg himself did put the minor finishing touches on the building the Wells Construction Company was amply able to do so. In this connection the Court found:

"That at said time the Wells Construction Company was in good and substantial financial condition, able to complete and perform said building contract for defendants, and to carry on its business in the ordinary course."

Trans., p. 138.

The agreements of June 20th, 1910, and November 26th, 1910, themselves show that they were taken by Peter Sandberg personally in his individual capacity, to protect himself against the accommodation endorsements made by him individually in behalf of the Wells Construction Company. Counsel for plaintiff makes the unwarranted statements all the way through his brief regarding these indemnity agreements, "Exhibits No. 9 and No. 10," that they were given to indemnify the community estate of Sandberg and wife, because of Sandberg executing the indemnity bond, "Exhibit No. 2." This is not the fact, as shown by the testimony and found by the Court.

In this connection see particularly the testimony of Simon Mettler, Trans., pp. 211-13-14-15, and the Court's Finding No. XII., Trans., p. 137.

Simon Mettler, Trans., pp. 210- 211-214.

Joseph Wells, Trans., p. 199.

which shows conclusively that Mathilda Sandberg never at any time knew of, acquiesced in, approved or ratified the acts of her husband in all of the matters and agreements referred to in this case, except the contract for the building of the Kentucky Building.

Mathilda Sandberg, Trans., pp. 182-187-194.

See particularly in this connection the Court's Finding No. XXIII.

Trans., pp. 152-153-154.

On page 43 of plaintiff's brief we find the following:

"It is exceedingly important, if taken as true, that one of the banks absorbed all the proceeds, because thereby community liabilities were so much reduced, Sandberg relieved, and so much of the debt paid to and received by the bank then holding Sandberg's personal endorsement on the renewed note."

It will be borne in mind in this connection that the obligations to the Bank of Vancouver and the Molsons Bank were on the same basis as the transaction involved in this case. Sandberg endorsed the notes of Mettler and the Wells Construction Company to these institutions, as shown by the testimony, purely as an accommodation, and his liability and obligations to those institutions were separate, and were not those of the community, so that the fact that the indebtedness owing these institutions by the Wells Construction Company was reduced by a conveyance or sale of the property held in trust does not change the situation.

The witness Mettler, it will be remembered, testified regarding the circumstances leading up to the borrowing of the money from the Bank of Vancouver, substantially as follows:

"We went to Vancouver and got Mr. Sandberg to go with us, and get some money from the Bank of Vancouver. Mr. Dewar was manager of the Bank of Vancouver, and he said to Mr. Sandberg, 'Why don't you get some security for putting your name on those notes?' and Mr. Sandberg said, 'No, I would

rather for you to secure yourself,' and that was understood. On the strength of that conversation he let us have twenty-five thousand dollars, and it was understood we were to come back to Tacoma and execute the deeds to the bank, and then they found that an alien could not hold land in the State of Washington, and it was then proposed that the land be deeded to the Kentucky Liquor Company as security for the bank."

Simon Mettler, Trans., p. 231.

In this connection defendant Peter Sandberg testified that Mettler asked him to go up to Vancouver to assist him in getting some money, and thereupon detailed a conversation with Mr. Dewar, manager of the bank, regarding the deeding of the property as security, and that he signed the note as a surety.

Peter Sandberg, Trans., pp. 235-236.

Witness Vergowe stated that Sandberg endorsed this Bank of Vancouver note purely as a matter of accommodation, and that it was agreed then that the property would be turned over to the Kentucky Liquor Company as security for the Bank of Vancouver alone.

Trans., p. 241.

The proceedings in bankruptcy show that this property was in fact turned over as security for the Bank of Vancouver alone, and not for the indemnity or security of anybody else, and was finally foreclosed and sold and bid in by it in reduction



of the indebtedness of the Wells Construction Company.

Exhibit "E," Trans., p. 245.

It will be seen from the foregoing that the obligations of Sandberg to the Banks of Vancouver were purely an accommodation endorsement for the Wells Construction Company, and was, and is, a separate debt and obligation of defendant Peter Sandberg, for which the community is not now, and never was, liable, so that any reduction of the liability due the Banks of Vancouver could in no wise result in a benefit or advantage to the community of Sandberg and wife.

On page 45 of his brief, counsel for plaintiff refers to the community personalty. The question of community personalty is entirely outside of this case. It might be that plaintiff on its judgment could reach the community personalty. If there is sufficient to satisfy his judgment there is no occasion for this writ of error.

The defendant Mathilda Sandberg in her own behalf, and in behalf of the legal entity, the community of Sandberg and wife, defended this case for the purpose of preventing a judgment being entered against the community, which would be a lien on their real property, setting up specifically and in detail a description of their real property. The fact that the husband has control of the community personalty under our law can have no bearing whatever on the situation as far as this defense



is concerned. It is a fact that Mr. Peer and Mr. Peterson were on November 26th, 1910, elected temporary secretary and president of Wells Construction Company, simply for the purpose of receiving and holding its stock in trust for its stockholders, and holding in *statu quo* while Mr. Sandberg investigated whether or not he would undertake to finance it. He accomplished this within the course of two or three days, and decided that he did not want to undertake to finance it, and the stock was immediately turned over as directed by the stockholders, so that the connection of Peer and Peterson as officers of said corporation did not continue over a period of but a few days.

See Court's Finding No. XXV., Trans, p. 154.

Peter Sandberg, Trans., p. 104.

On pages 46 and 47 counsel contends that Sandberg's executing of the indemnity agreement, "Exhibit A," resulted in the American Surety Company executing the bond to the Powell River Paper Company, and that enabled the Wells Construction Company to enter into a contract with it, and that the Wells Construction Company would make some money to pay Sandberg back for money he had advanced it on the Kentucky Building.

His argument and reasoning in this connection are a good deal like the old nursery rhyme, "The House that Jack Built."

In its complaint in this action, plaintiff alleged

that at the time the indemnity agreement sued on herein was executed by defendant Sandberg, that he was indebted to the Wells Construction Company in a large amount, and that by reason of his executing the indemnity agreement in behalf of the Wells Construction Company the Wells Construction Company postponed the time of payment of his debt to it, thereby resulting in a benefit to the community, and in that manner the community received a benefit all growing out of Sandberg's execution of the indemnity agreement.

See Paragraph XIII., Plaintiff's Complaint, Trans., p. 38.

See Paragraph X., Plaintiff's Reply, Trans., p. 54.

It is impossible to reconcile the two positions.

It is next contended that the judgment rendered in British Columbia in behalf of the Powell River Paper Company against plaintiff in error was conclusive upon Sandberg and wife, because Sandberg had notice of it. Counsel did not undertake to explain how Mrs. Sandberg could have intervened in that case even if she had been notified of its pendency and had an adjudication by the Supreme Court of British Columbia regarding the community nature of her husband's undertaking and the legal status of their real property in this State. The contention is too ridiculous to merit consideration.

Pages 48 to 52 of plaintiff's brief are devoted to a discussion of the proposition that a certain complaint verified by Peter Sandberg in an action brought by him against Simon Mettler was evidence against him. We have no quarrel with this contention; the complaint was admitted in evidence and considered by the Court.

See Op. Trans., p. 85.

Counsel for plaintiff in error cites in support of his position a case against Sandberg in the Superior Court of Pierce County, Washington (*nisi prius*.) If that court is to be regarded as an authority in this jurisdiction it might not be out of the way to suggest the fact that actions in behalf of the British Columbia banks were instituted against Sandberg and wife in the same court on the obligations of the Wells Construction Company and Mettler executed to those banks, and endorsed by Sandberg, which actions were defended on the same grounds as the defense made here, resulting in the same judgment as made by Judge Cushman in this action, which was not appealed from, and that the Honorable R. A. Ballinger, the learned author of "Ballinger's Law of Community Property," was counsel for the banks.

In view of the clear and convincing nature of the proof in this case, and the findings as made by the trial Court, we are quite at a loss to understand why this Court should be burdened with its review, as it seems to us well nigh impossible for a litigant

to make a plainer, clearer case entitling him to the relief demanded than was made by Mrs. Sandberg.

We respectfully submit that the judgment of the lower court should be affirmed.

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CHARLES T. PETERSON,

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